

STATE OF MICHIGAN
COURT OF APPEALS

PATRIOT PUMPS, L.L.C., d/b/a THOMPSON
PUMP MIDWEST,

UNPUBLISHED
February 1, 2011

Plaintiff-Appellee,

v

No. 292919
Wayne Circuit Court
LC No. 09-000599-CK

JOHN E. GREEN COMPANY,

Defendant-Appellee,

and

AMERICAN MARSH PUMPS,

Defendant-Appellant.

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Defendant American Marsh Pumps (American Marsh) appeals by right the circuit court's order compelling it to participate in arbitration with plaintiff Patriot Pumps, LLC (plaintiff), and defendant John E. Green Company (Green). We reverse and remand for further proceedings.

We review de novo a circuit court's determination regarding the existence and enforceability of an arbitration agreement. *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000). We also review de novo as a question of law the interpretation of a contract. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

The arbitrability of an issue and the scope of arbitration are determined by the parties' agreement. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 163; 742 NW2d 409 (2007). "To ascertain the arbitrability of an issue, [a] court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract." *Fromm v MEEMIC Ins Co*, 264 Mich App 302, 305-306; 690 NW2d 528 (2004) (citation omitted). When interpreting a contract, this Court looks to the contractual language to determine the intent of the parties. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). We must examine the language of the contract and accord words their ordinary and plain meanings if such meanings are apparent.

Wilkie v Auto-Owners Ins Co, 469 Mich 41, 47; 664 NW2d 776 (2003). If the language is unambiguous, courts must interpret and enforce the contract as written. *Quality Products*, 469 Mich at 375. “[A]n unambiguous contractual provision is reflective of the parties’ intent as a matter of law.” *Id.*

On January 25, 2007, Green entered into a contract with Clark-Roncelli to perform construction services. The contract provided in relevant part:

[A]ny dispute between Clark-Roncelli and Subcontractor [Green] shall, at Clark-Roncelli’s sole option, be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. If Clark-Roncelli elects to arbitrate, then the arbitration shall be in Macomb County, Michigan. The foregoing agreement to arbitrate shall be specifically enforceable in any court of competent jurisdiction.

To perform the contract, Green ordered equipment from plaintiff, which in turn ordered equipment from American Marsh. The contract between Green and plaintiff stated:

If Buyer [Green] is required under the Buyer’s Contract [Green’s contract with Clark-Roncelli] to resolve any disputes by arbitration, and any dispute exists between Buyer and the other party to the Buyer’s Contract that is to be resolved by arbitration and involves any goods or services provided by Seller [plaintiff] under this Purchase Order, Seller hereby agrees to submit such dispute concerning its goods or services to binding arbitration for decision in accordance with the provisions of the Buyer’s Contract providing for arbitration and under which Buyer is obligated to resolve such dispute. Seller agrees to be made a party to the arbitration under the Buyer’s Contract to resolve such dispute concerning the goods or services provided by Seller under this Purchase Order. If Seller can not [sic] be made a party to such arbitration, because a party other than Buyer has objected to such procedure or for any other reason, Seller agrees to arbitrate separately with Buyer the dispute concerning any of the goods or services provided by Seller under this Purchase Order, and in such arbitration the same arbitrators as used in the arbitration under the Buyer’s Contract shall be used to decide the dispute between Buyer and Seller concerning the goods and services provided by Seller under this Purchase Order. The rules and procedure governing such arbitration shall be the same as the rules and procedure used in the arbitration under the Buyer’s Contract.

On April 9, 2009, the circuit court granted Green’s motion to compel plaintiff to arbitrate its dispute against Green. Although the court did not specify the basis for its decision, it appears from the record that the court determined that the Green/plaintiff contract incorporated the arbitration provision in the Clark-Roncelli/Green contract, which the court deemed enforceable against plaintiff. The circuit court’s determination was erroneous. The plain, unambiguous language of the Clark-Roncelli/Green contract gave Clark-Roncelli the “sole option” to arbitrate any dispute that arose. The arbitration provision did not provide Green with a right to compel arbitration of disputes. Further, the Green/plaintiff contract required plaintiff to arbitrate a dispute only to the extent that a dispute arose under the Clark-Roncelli/Green contract that Green was in fact compelled to arbitrate. The arbitration provision in the Green/plaintiff contract was

clearly triggered only if Clark-Roncelli and Green participated in arbitration to resolve a dispute under the Clark-Roncelli/Green contract.

The Green/plaintiff contract also contained the following provision:

Seller and Buyer agree that by this reference the job drawings, specifications and other documents forming the Buyer's Contract are incorporated in, and made a part of this Purchase Order, and all services performed and goods furnished by Seller under this Purchase Order shall comply with all requirements of such documents.

Because the Clark-Roncelli/Green contract provided only Clark-Roncelli with the right to compel arbitration of a dispute, the Green/plaintiff contract's incorporation of that arbitration provision did not give Green an option to compel arbitration with respect to plaintiff. The circuit court's order requiring plaintiff to arbitrate its dispute against Green contravenes the plain contractual language, and the court's ruling was therefore erroneous.¹

Because Green did not have a right to compel arbitration against plaintiff, plaintiff did not acquire such a right with respect to American Marsh. The "terms and conditions" of the purchase order of March 2, 2007, provided:

Buyer [plaintiff] has the same rights and privileges against Seller [American Marsh] as Owner of project has against Buyer under Buyer's contract documents.^[2]

The contract does not specify the identity of the "owner" of the project, and nothing indicates that the "owner" had a right to compel arbitration against plaintiff. Even assuming that Green was the "owner" of the project, the provision still does not require arbitration of a dispute between American Marsh and plaintiff or Green. Quite simply, the plaintiff/American Marsh contract could not grant to plaintiff by incorporation a right that did not exist under the Green/plaintiff contract in the first instance. In addition, we note that the "standard terms and conditions of sales" accompanying plaintiff's application for credit did not contain an arbitration provision.

¹ We note that it was not incumbent on American Marsh to appeal the circuit court's order because it was not aggrieved by the court's ruling. See *Kieta v Thomas M Cooley Law School*, ___ Mich App ___, ___ NW2d ___ (2010). In fact, the circuit court specifically determined at the time that American Marsh could not be compelled to arbitrate the dispute.

² Although American Marsh posits that the purchase order terms and conditions did not constitute a contract because American Marsh never accepted the terms, the purchase order specifically stated that a seller may accept the terms by delivering the products purchased. It is undisputed that American Marsh delivered the equipment purchased.

None of the contracts involved in this dispute contains an arbitration provision that compels American Marsh to engage in arbitration. Therefore, the circuit court erred by ordering American Marsh to participate in the arbitration involving plaintiff and Green.

Reversed and remanded for further proceedings. We do not retain jurisdiction. As the prevailing party, American Marsh may tax costs pursuant to MCR 7.219.

/s/ Kathleen Jansen

/s/ Donald S. Owens

/s/ Douglas B. Shapiro